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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1934.

No. 662

ROSE KIMEN,

Petitioner,

vs.

ATLAS EXCHANGE NATIONAL BANK OF CHICAGO, A CORPORATION,

Respondent.

ON WRIT OF CERTIORARI.

Petitioner's Brief and Argument.

SAMUEL A. ETTELSON,
EDWARD C. HIGGINS,
Attorneys for Petitioner.

SAMUEL A. ETTELSON,
EDWARD C. HIGGINS,
HERBERT A. SALZMAN,
Of Counsel.

CHICAGO LAW PRINTING CO., 111 NORTH WACKER DRIVE (COR. WASHINGTON ST.)

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ON WRIT OF CERTIORARI.

Petitioner's Brief and Argument.

To the Honorable Supreme Court of the United States:

This cause is now before this Honorable Court on a writ of *certiorari* granted March 4, 1935, to review the judgment of the Appellate Court of Illinois, First District, reversing the judgment of the Circuit Court of Illinois entered in favor of the petitioner and against the respondent.

I.

Opinion of the Court Below.

The opinion of the Appellate Court of Illinois, First District, is not officially reported. An abstract report of the decision of said Court is reported in 275 Ill. App. 638. The full opinion rendered by said Court may be found in the Transcript of Record filed herein, beginning at page 69.

II.

Jurisdiction of this Court.

The question of this Court's jurisdiction to review the decision of the Appellate Court of Illinois, First District, was presented and argued by both parties on petition for writ of *certiorari*. This Court decided in favor of its jurisdiction and granted the writ. The case is now before the Court for review on the merits and we, therefore, feel that the jurisdictional question is closed and no further argument need be made on that behalf. We, however, will restate the grounds of this Court's jurisdiction so that we strictly comply with the Court's rules.

The petitioner respectfully represents to this Honorable Court that this case involves a Federal question, namely, the rights, privileges, immunities and the extent of liability, if any, of a national banking association organized and existing under the laws of the United States.

First National Bank etc. v. *Alexander Anderson*, 172 U. S. 573.

Leander J. McCormick v. *Market National Bank of Chicago*, 165 U. S. 538.

Logan County National Bank v. *Townsend*, 139 U. S. 67, pp. 72, 73.

It follows from the fact that this case involves a Federal question and from the further fact that the decision of the Appellate Court of Illinois, First District, is from the highest court of the State of Illinois in which a decision in this case can be obtained, that this Court has jurisdiction to review the decision of said Appellate Court of Illinois.

Chicago & Eastern Illinois R. R. Co. v. *Industrial Commission of Illinois*, 284 U. S. 296, 297.
Chesapeake & Ohio R. R. Co. v. *Mihas*, 280 U. S. 102, 104.
Minneapolis, St. P. & S. S. Ry. Co. v. *Bock*, 279 U. S. 410.
American Railway Express Co. v. *Levee*, 263 U. S. 19.

III.

Statement of the Case.

The petitioner respectfully represents that in the trial court she was the plaintiff and the respondent was the defendant.

The uncontradicted facts shown by the evidence are: That the respondent, by its cashier, solicited the petitioner to purchase four One Thousand Dollar ($1,000) par value First National Company real estate bonds; that the price at which such bonds were first offered for sale was Ninety-eight Dollars ($98.00) per hundred and accrued interest; that the petitioner refused to purchase them, stating to said cashier that she needed her money, and that she knew nothing about the bonds; that said cashier then offered, on behalf of the respondent, to repurchase said bonds from the petitioner if she would buy them; that the petitioner agreed to make the purchase, provided said offer

to repurchase was reduced to writing; that said cashier stated that if said agreement was reduced to writing, the bonds would cost Ninety-eight and one half Dollars ($98.50) per hundred, and accrued interest, which price the petitioner agreed to and did pay and which aggregated the sum of Four Thousand Four Dollars and Forty-seven Cents ($4,004.47); and that in return therefor, the petitioner received the four bonds and a written contract wherein the respondent agreed to repurchase the same at their maturity at par and accrued interest. At the maturity thereof, the petitioner called upon the said cashier, on behalf of said respondent, to repurchase said bonds, but that said respondent refused so to do. (Rec. pp. 13-23)

The petitioner instituted an action in assumpsit filing a special count for the breach of the written contract and common counts in general assumpsit. (Rec. p. 1)

The respondent having filed a special plea alleging in substance that the written contract was *ultra vires* the respondent under the National Bank Act (Rec. p. 6), the petitioner filed an additional count in general assumpsit for the recovery of the moneys paid by her to the respondent for the bonds and the repurchase agreement. (Rec. p. 8)

After a trial before a jury, the trial court entered a judgment in favor of the petitioner and against the respondent upon a verdict for the petitioner in the sum of Four Thousand Four Dollars and Forty-seven Cents ($4,004.47) and accrued interest, this being the amount paid by the petitioner for said bonds and written contract. (Rec. p. 13)

On June 15, 1934, the Appellate Court of Illinois, First District, on writ of error sued out to the Circuit Court of Cook County, reversed said judgment and, without re-

manding, entered its own judgment against the petitioner. (Rec. p. 63)

On October 23, 1934, the Supreme Court of Illinois denied to the petitioner a leave to appeal to said Supreme Court of Illinois from the judgment of the Appellate Court of Illinois, First District, (Rec. p. 80), and by virtue of sub-section (2), Section 75, Article VIII of the Illinois Civil Practice Act (Cahill's Ill. Rev. St., 1933, chap. 110, par. 203) (See Appendix), said judgment of the Appellate Court of Illinois became final.

IV.

Specifications of Error.

The errors on account of which the judgment of the Appellate Court of Illinois, First District, should be reversed are as follows, to wit:

1. The Appellate Court of Illinois erred, after finding and holding that the repurchase contract and agreement was *ultra vires* and void under the National Bank Act, in finding and holding that the petitioner was not entitled to recover from the respondent on an implied assumpsit, the moneys paid by the petitioner to said respondent in reliance upon said void contract and agreement.

2. The Appellate Court of Illinois erred, after finding and holding that the repurchase contract and agreement was *ultra vires* and void under the National Bank Act, in not finding and holding that the petitioner was entitled to recover from the respondent herein on an implied assumpsit, the moneys paid by the petitioner to said respondent in reliance upon said void contract and agreement.

V.

Summary of Argument.

A. The petitioner is entitled to recover from the respondent, in general assumpsit, the moneys which she paid to said respondent for the purchase of the First National Company bonds in reliance upon the respondent's agreement to repurchase said bonds, which agreement said respondent repudiated as being ultra vires under the National Bank Act. (44 Stat. 1226.)

VI.

Argument.

A. The petitioner is entitled to recover from the respondent, in general assumpsit, the moneys which she paid to said respondent for the purchase of the First National Company bonds in reliance upon the respondent's agreement to repurchase said bonds, which agreement said respondent repudiated as being ultra vires under the National Bank Act. (44 Stat. 1226.)

The agreement of the respondent, in reliance upon which the petitioner purchased the bonds in question, provided in substance, "should you desire to re-sell these bonds to us, we hereby agree to re-purchase same at maturity at par or $4,000 and accrued interest," (Rec. p. 3) and when the respondent was called upon to perform its said contract and to repurchase said bonds, it repudiated its agreement on the ground that it had no power under the National Bank Act (44 Stat. 1226) to make such a contract.

The National Bank Act (44 Stat. 1226) provides:

> "* * * Provided, That the business of buying and selling investment securities shall hereafter be limited to buying and selling without recourse marketable obligations, evidencing indebtedness of any person, co-partnership, association or corporation, in the form of bonds, notes and/or debentures, commonly known as investment securities * * *."

We do not concern ourselves in the argument of this case with the question whether in fact the respondent did have the power to make such a contract. The case proceeded in the trial court on the theory that the respondent, having repudiated its agreement as being *ultra vires*, is liable in general assumpsit for the amount of money paid by the petitioner in reliance upon the alleged *ultra vires* agreement. (Rec. pp. 8, 23, 39, 41) We, therefore, present our case to this Court on the assumption that the contract is *ultra vires*, but we respectfully submit that the petitioner is nonetheless entitled to recover in this action the money paid by her for said bonds.

It is a well-settled rule of law often decided by this Court, that a corporation, which has repudiated a contract as being *ultra vires*, is not permitted to retain the benefits which it has received under such a void agreement, but that it is liable therefor upon an implied assumpsit.

Central Transportation Co. v. *Pullman, etc., Co.*, 139 U. S. 24, 60.

Logan County National Bank v. *Townsend*, 139 U. S. 67.

Pullman Car Co. v. *Central Transportation Co.*, 171 U. S. 138, 151.

Aldrich v. *Chemical National Bank*, 176 U. S. 618.

Citizens' Central National Bank v. *Appleton*, 216 U. S. 196.

Coon v. *Smith*, 4 Fed. Supp. 960.

This doctrine for which we contend is distinguishable from the general rule announced by this Court that a corporation may not be estopped to plead the defense of *ultra vires* and that no rights arise out of an *ultra vires* contract (*Texas & Pacific Ry. Co.* v. *Pottorff*, 291 U. S. 245). The petitioner's right of recovery in this case is predicated upon the theory that the respondent corporation, having received money under a void agreement, is not, in equity and good conscience, entitled to retain the money and at the same time repudiate the obligations of the contract.

The case of *Citizens' Central National Bank* v. *Appleton*, *supra*, 216 U. S. 196, is one wherein a National Bank to which one Samuels was indebted in the sum of Ten Thousand Dollars ($10,000), induced another bank to lend Twelve Thousand Dollars ($12,000) to Samuels and guaranteed the repayment of the loan. Samuels had prior thereto agreed to pay the National Bank Ten Thousand Dollars ($10,000) out of the Twelve Thousand Dollars ($12,000) loan. When sued on the guaranty, the National Bank defended on the ground that a guaranty was beyond its powers and in violation of the national banking laws. Of this defense, the Court said, on page 202:

> "But this action need not be regarded as one on the written contract of guaranty, but as based on an implied contract between the Cooper Exchange Bank and the Central National Bank * * *. The law would be very impotent to do justice if it could not, under those circumstances, and without violating established legal principles, compel the Central National Bank to recognize and discharge that duty. * * * In short, the Central National Bank, by means of the device mentioned, got Ten Thousand Dollars ($10,000) * * * for its own benefit, and having used it for its own benefit,

it now seeks to avoid liability therefor, upon the ground that it was not allowed by the law of its creation to execute the guaranty in question. We know of no adjudged case that stands in the way of relief being granted as asked by the plaintiff. But there are many that will authorize such relief."

The Court then reviewed and discussed with approval the cases last cited by us in support of this point. For that reason, the *Appleton* case, *supra*, 216 U. S. 196, is important.

The case of *Coon* v. *Smith*, 4 Fed. Supp. 960, is directly in point upon the question of the right of the petitioner to recover, in general assumpsit, the moneys paid in reliance upon a repurchase agreement which the District Court in that case held to be *ultra vires*. We do not agree with the opinion of the learned Judge that a national bank has no authority to enter into a repurchase agreement, but his opinion contains a complete discussion of the authorities which support our contention, *i. e.*, that the petitioner is entitled to recover, on the implied assumpsit, the moneys paid by her in reliance upon the agreement which the respondent repudiated as being *ultra vires*.

The case of *Texas & Pacific Ry. Co.* v. *Pottorff*, *supra*, 291 U. S. 245, cited by the Appellate Court of Illinois in support of its proposition that the petitioner could not recover, in general assumpsit, the moneys paid in reliance upon the repurchase agreement, clearly does not sustain that proposition. There is nothing in the facts of the *Pottorff* case, or in what this Court said in its opinion, that is in conflict, either directly or indirectly, with the cases last cited by us.

In the *Pottorff* case, this Court said that a national bank could not be estopped from defending an action on a con-

tract on the ground that it was *ultra vires*, and that *if the doctrine of the recovery of the benefits obtained by means of an* ultra vires *contract were applicable* (to the facts in the *Pottorff* case), the complainant therein would still not be entitled to recover the full amount of its deposit in the defunct bank, because,

> "*the argument if applicable would not help the Railway.* Such claim under the doctrine of unjust enrichment is assimilated to an obligation of contract; and does not, in the absence of an identifiable *res* and a constructive trust based on special circumstances of misconduct, confer a preference over other creditors. The pledge here challenged having failed because illegal, the Railway is entitled only to a dividend as a general creditor. Its right thereto is conceded." (Italics our own)

In the case at bar, we do not claim any recovery upon the contract; we do not claim that the respondent is estopped to plead the defense of *ultra vires;* we contend only that in law, the respondent is liable for the money received from the petitioner in reliance upon an alleged *ultra vires* contract.

In opposing any recovery by the petitioner on the implied assumpsit, the respondent has urged that the repurchase contract is illegal and contrary to public policy, and, therefore, that the law will not give any relief to her, but will leave the parties where it finds them.

In support of this theory, the respondent relies upon certain language used by the Supreme Court of Illinois in the case of *Knass* v. *Madison & Kedzie State Bank,* 354 Ill. 554, and also upon certain language found in the National Bank Act. (44 Stat. 1226)

In the *Knass* case, *supra*, 354 Ill. 554, the Supreme Court of Illinois said:

> "Are such contracts as here relied upon void as against public policy or violative of statutory enactment? Contracts against public policy are generally unenforceable by any remedy. (Re-statement of the Law of Contracts, Am. Law. Ins., sec. 369.) Public policy is a principle of law which holds that no one may lawfully do that which has a tendency to injure the public or to be against the public good. Banks are quasi-public institutions. Their well-being concerns not only the stockholders but the depositors and public at large. Contracts are against public policy when they tend to injure the public. Agreements such as are here involved fall within that category. Recent experience, so general as to afford the basis of judicial notice, has shown that contracts not within the powers conferred on banks and which so jeopardize the safety of bank deposits as to result in their loss, tend to produce widespread injury to the public, and may properly be held void though there be found no specific statutory prohibition against them."

We are assuming, as we have heretofore stated, that the repurchase contract is *ultra vires*, but we respectfully submit that there is nothing in the contract, in its effect, or in the circumstances surrounding it which renders it contrary to public policy.

The Supreme Court of Illinois held the contract in the *Knass* case against public policy because it said that contracts of such character endangered the financial structures of banks and were thereby detrimental to the depositors and the public at large.

The Illinois Court indicated that the bank in that case was acting as a broker when it sold the bonds to the complainant. The Court said, on pages 568 and 569 of its opinion: "The fact that the bank may have received a commission for selling them (the bonds) in no wise renders the mortgage bonds obligations of the bank" and "it will be presumed that the mortgagor, * * * received the amount paid by the claimants (complainants in the case) less commissions charged for the sale." It follows that the bank did not receive, for its own use and benefit, the purchase price paid for the bonds. The money was paid over to the maker of the bonds. Under these facts, when the bank attempted to obligate itself to repurchase the bonds, it did not receive an asset sufficient to meet its obligation if it matured.

The facts in the case at bar disclose an entirely different situation and one wherein the dangers alluded to by the Illinois Court are not present.

In the case at bar, the respondent must be regarded as having been the owner of the bonds which it sold to the petitioner, since selling property is an act of ownership, unless the contrary is shown. *Farmers' & Merchants' State Bank* v. *Mellum, et al.*, 173 Minn. 327, 212 N. W. 308. The record in the case at bar does not disclose that when the respondent sold the bonds to the petitioner, it was acting in any other capacity but as the owner of them. Being the owner of the bonds, the respondent received and retained, for its own use, the moneys which the petitioner paid for the purchase of said bonds in reliance upon the repurchase contract. Reduced to simple terms, the transaction resulted in the respondent substituting cash among its assets in the place of the bonds. At the same time that the respondent incurred a liability to repurchase the bonds, it received an asset equivalent to the liability and sufficient to offset and pay it at its maturity.

The bank could very readily have protected itself, its stockholders, creditors, and the public at large by creating a reserve against the contingency of the maturity of any liability on the repurchase contract.

Considering now the claim that the contract is illegal because it violates a statutory prohibition, we respectfully submit that if the contract is deemed to afford recourse so as to constitute the original sale one with recourse, it does not violate any statutory prohibition.

The National Bank Act limits the powers of the respondent to sell investment securities to doing so without recourse. The power to sell with recourse is withheld from national banks, and when the respondent sold the bonds to the petitioner with recourse against it, the respondent was exercising a power not granted by the statute, but it was not violating any statutory prohibition, in the sense of the words, that would give rise to an occasion for this Court to apply the doctrine that the law leaves parties to an illegal contract where it finds them.

All corporations are limited in the exercise of powers to those granted in the statute pursuant to which they are organized and while the exercise of powers not granted makes the contract *ultra vires* and unlawful and void, still this Court has always permitted the recovery of property and money parted with on the faith of a contract unlawful as being *ultra vires*. *Pullman's, etc., Co.* v. *Central Transportation Co.*, 139 U. S. 24.

The language in the opinion of this Court in the case of *Pullman's, etc., Co.* v. *Central Transportation Co.*, 139 U. S. 24, is particularly applicable to the case at bar, where it is said on page 60:

> "A contract *ultra vires* being unlawful and void, not because it is in itself immoral, but because the corporation, by the law of its creation, is incapable of making

it, the courts, while refusing to maintain any action upon the unlawful contract, have always striven to do justice between the parties, so far as could be done consistently with adherence to law, by permitting property or money parted with on the faith of the unlawful contract, to be recovered back, or compensation to be made for it.

"In such case, however, the action is not maintained upon the unlawful contract, nor according to its terms, but on an implied contract of the defendant to return, or failing to do that, to make compensation for, property or money which it has no right to retain. To maintain such an action is not to affirm, but to disaffirm, the unlawful contract.'"

We respectfully submit that even if the repurchase contract made by the respondent is *ultra vires,* as we have *assumed* that it is, it is not illegal or contrary to public policy.

VII.

CONCLUSION.

We respectfully submit that we have shown that even if the repurchase agreement is *ultra vires* and void, the petitioner is entitled to recover from the respondent in general assumpsit the moneys which she paid to the respondent for the purchase of the First National Company Bonds in reliance upon the respondent's agreement to repurchase said bonds, which agreement said respondent repudiated as being *ultra vires* under the National Bank Act, and that in holding that the petitioner was not entitled so to recover, the Appellate Court of Illinois, First District, erred. We, therefore, pray that the judgment of said Appellate Court of Illinois, First District, reversing the judgment of the Circuit Court of Cook County, be reversed by this Honorable Court.

Respectfully submitted,

SAMUEL A. ETTELSON,
EDWARD C. HIGGINS,
Attorneys for Petitioner.

SAMUEL A. ETTELSON,
EDWARD C. HIGGINS,
HERBERT A. SALZMAN,
Of Counsel.

APPENDIX.

Illinois Civil Practice Act, sub-section (2) of Section 75, Article VIII (Cahill's Ill. Rev. St. Chap, 110, Par. 203):

"In all cases in which their jurisdiction is invoked pursuant to law, except those wherein appeals are specifically required by the Constitution of the State to be allowed from the Appellate Courts to the Supreme Court, the judgments or decrees of the Appellate Courts shall be final, subject, however, to the following exceptions: (1) In case a majority of the judges of the Appellate Court or of any branch thereof shall be of opinion that a case (regardless of the amount involved) decided by them involves a question of such importance, either on account of principal or collateral interests, as that it should be passed upon by the Supreme Court, they may in such case grant leave to appeal to the Supreme Court on petition of parties to the cause, in which case the said Appellate Court shall certify to the Supreme Court the grounds of granting said appeal. (2) In any such case as is hereinbefore made final in the said Appellate Courts it shall be competent for the Supreme Court to grant leave to appeal for its review and determination with the same power and authority in the case, and with like effect, as if it had been carried by appeal to the said Supreme Court; *Provided, however,* that in action *ex contractu* (exclusive of actions involving a penalty) and in all cases sounding in damages the judgment, exclusive of costs, shall be more than fifteen hundred

dollars ($1500.00), or in cases in which the judgment is against the plaintiff and there is issued by the Appellate Court, or by one of the judges thereof in vacation, a certificate to the effect that there is fairly involved in the claim of the plaintiff more than fifteen hundred dollars ($1500.00). *And provided also,* that application under this Act to the Supreme Court to cause it to grant leave to appeal for its review and determination shall be made on or before twenty (20) days before the first day of the succeeding term of said Supreme Court. *Provided,* fifty (50) days shall have intervened between the day on which a rehearing in the Appellate Court shall have been denied or the day on which the leave to apply for a rehearing shall have expired without any such application having been made, and the first day of such succeeding term of said court. But if less than fifty (50) days shall have intervened as aforesaid, then such application shall be made on or before twenty (20) days before the first day of the second term of the Supreme Court succeeding the day on which a rehearing in the Appellate Court shall have been denied or the day upon which the leave to apply for a rehearing shall have expired without any such application having been made, otherwise said power of the Supreme Court to review the judgment and decree of the Appellate Court shall cease to exist."